are according to order, title passes at the moment of shipment and the purchaser is bound to pay the price.[2] If they do not fulfill the required conditions, the buyer need not accept them and there is no sale.[3] But when goods are shipped C. O. D., do the same rules apply? According to the better opinion, the condition of collection on delivery does not prevent the passing of title, though it denies the vendee the right of possession.[4] As to its effect upon the right of inspection, however, the few authorities are in confusion. On the one hand, it has been held that a carrier incurs no liability to the consignee for refusal to allow inspection.[5] On the other hand, an express company which allowed inspection was held not liable in an action by the vendor.[6] In this case the company had delivered the goods to the consignee upon deposit of the purchase price, and had agreed to return the deposit if the goods proved unsatisfactory. Upon the hypothesis that the vendee had a right of inspection, the court reasoned that the carrier should be protected in permitting a reasonable exercise thereof. The question, however, is squarely raised only in actions between the vendor and the vendee. In a Kentucky case where goods were sent C. O. D. without the consignee's authority for so transmitting them, the court diplomatically left it for the jury to determine whether there was a right of inspection.[7] A recent Michigan case raised the question incidentally, the court taking the position that a valid tender could not be made without such a right. *Thick* v. *Detroit, etc., R. R. Co.*, 101 N. W. Rep. 64.

As this utter lack of harmony prevails among the authorities, it may well be asked, what result should be reached on principle. There is a general rule among express companies not to allow inspection of goods sent C. O. D.; and in cases where this method of shipment is contemplated, the parties might well be taken to have agreed that this rule should form part of the contract.[8] After payments were made and the goods obtained, if they should prove not to be in accordance with the order, the buyer would have the usual remedies for the breach of the implied warranty that the goods conformed to the description. In some jurisdictions, he could sue only for damages; in others, he would be allowed the option of rescission or damages.[9] On principle, he clearly should have this option, since he had no opportunity to inspect.[10] But if the vendee had not authorized the shipment of goods C. O. D., he could not be taken to have contracted with reference to the rule of the carrier, his right of inspection would remain, and such a consignment ought not to constitute a valid tender.

DECLARATIONS OF TESTAMENTARY INTENTION. — As between an ante-testamentary declaration by a testator of his intention to dispose of his property in a certain way, and his post-testamentary declaration of the fact of such disposition, it is obvious that neither is entitled to a higher degree of credibility than the other. Nevertheless, the former was at first admitted in

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[2] Dutton *v.* Solomonson, 3 Bos. & Pul. 582.
[3] Lambden *v.* Hill, 6 Houst. (Del.) 29.
[4] Commonwealth *v.* Fleming, 130 Pa. St. 138.
[5] Wiltse *v.* Barnes, 46 Ia. 210; see Lane *v.* Chadwick, 146 Mass. 68.
[6] Lyons & Co. *v.* Hill & Co., 46 N. H. 49.
[7] Louisville Lithographic Co. *v.* Schedler, 23 Ky. Law Rep. 465.
[8] See Stevenson, Jaques & Co. *v.* McLean, 5 Q. B. D. 346, 349.
[9] Pope *v.* Allis, 115 U. S. 363. [10] See 16 HARV. L. REV. 465 ff.

evidence as a declaration showing a present condition of mind,[1] while the latter was excluded.[2] The admission of such declarations of present intention seems to have been in part influenced by a specious analogy. On an issue of testamentary capacity, declarations of a testator evincing an insane state of mind are clearly admissible.[3] The fundamental reason for the rule was, however, lost sight of in applying it to statements of intention. Imbecilic talk is circumstantial evidence of insanity;[4] but a declaration of intention, though a declaration of a state of mind, is as little circumstantial evidence of the existence of the intention, as is a declaration of an objective fact circumstantial evidence of the existence of the fact declared. On this reasoning some courts have, since the famous case of Sugden *v.* Lord St. Leonards,[5] put ante-testamentary and post-testamentary declarations on the same footing. The best considered opinions of American courts, whether excluding[6] or admitting[7] the latter, discuss the problem on principles applicable alike to both classes of declarations. The artificiality of attempting to distinguish between declarations of a state of mind and declarations of a fact is well illustrated by a Wisconsin case,[8] where a declaration by a testatrix that she had destroyed a will by burning was held inadmissible as evidence of the fact so declared, but admissible, nevertheless, to show "that she died in the belief that she had left no will," — reasoning that seems to involve the assumption that the testatrix may have been lying as to the fact, and yet telling the truth as to her belief in the fact.

On an issue of revocation, however, another question may be raised, an example of which is furnished by a recent Montana case, in which, to rebut a presumption of revocation, declarations by the testator that he was satisfied with the will were sought to be introduced, and were held inadmissible. *In re Colbert's Estate*, 78 Pac. Rep. 971. A present intention to do an act is evidence not only that the act was done, but also of the intention with which it was done, and in a well-known class of cases hearsay declarations of intention are admissible for the latter purpose. Thus, it is well settled that, when a change of domicile is in issue, the party's intention at the time of the moving may be shown by his declarations of an intention to move, as well when made before the time of the moving[9] as when accompanying the act.[10] The analogy of these cases would, therefore, point toward admitting the declarations in the principal case as evidence that the testator never had a revoking mind. These propositions obviously take for granted the admissibility of declarations of present intention, and are concerned only with the question of relevancy or remoteness. The credibility of a declaration of an intention, however, cannot depend on the inference to be drawn from the intention; and the question of hearsay bears only on the credibility of the declaration, not on the inference to be drawn from the fact declared. If, therefore, the test of credibility is to prevail, it is clear that a testator's declarations of intention are as objectionable to hearsay as

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1 Doe d. Shallcross *v.* Palmer, 16 Q. B. 747.
2 Quick *v.* Quick, 3 Sw. & Tr. 442.
3 Waterman *v.* Whitney, 11 N. Y. 157.
4 See 3 Wigmore, Evidence § 1768.
5 1 P. D. 154. Cockburn, C. J., admitted that he could not distinguish on principle between the two sorts of declarations.
6 See Throckmorton *v.* Holt, 180 U. S. 552.
7 See Lane *v.* Hill, 68 N. H. 275.
8 *In re* Valentine's Will, 93 Wis. 45.
9 Viles *v.* Waltham, 157 Mass. 542.
10 See Matzenbaugh *v.* The People, 194 Ill. 108.

his declarations of facts. As a matter of policy, owever, since a person's declarations are often the only possible method of determining intention, it may well be that the test of credibility should give way to that of practical convenience.

RES JUDICATA AS APPLIED TO MATTERS OF LAW. — It is commonly said that any right, question, or fact, distinctly put in issue and directly determined by a court of competent jurisdiction, cannot be disputed in a subsequent action between the same parties, whether upon the same or upon a different subject-matter.[1] So sweeping a definition of *res judicata* has in many cases led to a failure to distinguish between its two main applications. It applies primarily in cases where parties seek to litigate again the same cause of action which has been decided between them in a prior suit, but it is employed also to estop them from disputing in one action matters that have been authoritatively settled between them in another.[2] In the first class of cases the wisdom of the rule is clear. The parties have had their day in court, the matter is settled, and the most obvious public policy forbids them to raise the controversy afresh.[3] Consequently, the estoppel may fairly cover all matters connected with the former action. In the other class of cases, however, the rule should have a much narrower application. Not only should the estoppel be limited to matters distinctly put in issue and determined in the prior action,[4] but it should also be restricted to questions of fact or mixed questions of law and fact, and should never be extended to pure questions of law.[5] It is absurd to say that in so far as certain parties are concerned a court should be bound irrevocably to adhere to a proposition of law laid down in a previous suit. Yet this seems to be the result of many decisions.[6] Of course, as a matter of practice, the courts would usually follow a former decision upon the same state of facts, and so it would in most cases make little difference to the parties whether their rights were determined as *res judicata* or upon the theory of *stare decisis*. That this is not always true is shown by a recent Nebraska case. A statute provided that railroads should not be subject to county taxes on any part of their continuous line of road. The plaintiff, a railroad, owned a bridge which had for some time been taxed by the defendant county. In 1886 the railroad had brought an action to recover back these taxes. All facts concerning the bridge being conceded, the court had found that it was not a part of the continuous line of road within the meaning of the statute.[7] In subsequent suits between different parties this construction had been held to be erroneous. The present action was brought upon the same conceded facts to restrain the county from assessing the bridge for the year 1901. The court allowed the plaintiff to question the construction given the statute in the former action, holding that a question of law could not be *res judicata*. *Chicago, B., & Q. R. Co.* v. *Cass County*, 101 N. W. Rep. 11. The facts of this case furnish the strongest argument against the rule which applies the

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1 Southern Pac. R. Co. *v.* U. S., 168 U. S. 1.
2 2 Black, Judgments § 504.
3 2 *Ibid* § 500.
4 Cromwell *v.* County of Sac, 94 U. S. 351.
5 Bigelow, Estoppel 100; Philadelphia *v.* Ridge Ave. R. R. Co., 142 Pa. St. 484.
6 Southern, etc., Co. *v.* St. Pauls, etc., R. Co., 5 C. C. A. 249.
7 Cass County *v.* Chicago, etc., R. Co., 25 Neb. 348.